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IMPORT ADMINISTRATION

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November 22, 2004

VIA HAND DELIVERY

Honorable James J. Jochum
Assistant Secretary for Import Administration
Central Records Unit, Room 1870
14th Street & Constitution Avenue, N.W.
Washington, DC 20230

**Re: Certification of Factual Information to Import Administration During
Antidumping and Countervailing Duty Proceedings: Comments Concerning
the Notice of Proposed Rulemaking**

Dear Mr. Secretary:

On behalf of Nucor Corporation, we hereby submit these comments in response to the Federal Register notice issued by the Department of Commerce with respect to its proposed rulemaking concerning certifications of factual information to the Import Administration during antidumping and countervailing duty proceedings.¹ Nucor appreciates this opportunity to provide its comments to the Department's proposals and further commends the Department in its continued effort to ensure that antidumping and countervailing duty proceedings proceed smoothly, fairly, and without the risk of influence owing to misleading or erroneous information. With this goal in mind, Nucor hereby provides these comments and suggestions for the Department's consideration and implementation.

¹ Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings—Notice of Proposed Rulemaking and Request for Comments, 69 Fed. Reg. 56,738 (Sept. 22, 2004) ("NPRM").

I. GENERAL COMMENTS

Nucor supports the Department's efforts to revise its required certifications of factual information that are submitted in connection with documents filed in antidumping and countervailing duty investigations. Nucor believes that both the proposed company and representative certifications contain language that 1) strengthens and reaffirms to all parties the Departmental requirement to submit factually correct and truthful information, 2) places the onus upon the certifying party to inform the Department of any material omission of fact or material misrepresentation that may exist in the accompanying submission, 3) and places the certifying individual on notice of the potential ramifications for failing to abide by terms of the certification. Nonetheless, Nucor believes that the Department need address at least two issues of clarification before it finalizes any certification language and promulgates final rules. Additionally, as discussed *infra*, Nucor believes that while the proposed certifications provide notice to parties of the potential ramifications of submitting misrepresentations or omissions of fact, the Department should ensure that certain mechanisms are in place for it to utilize should there arise the need for enforcement of the certifications' provisions.

II. REGULATORY CLARIFICATIONS OR REVISIONS

A. Reasonable Inquiries

In the representative certification, the Department has proposed language which requires parties to certify the accuracy and completeness of the submission "after an inquiry reasonable under the circumstances."² In clarifying the scope of the meaning of an "inquiry reasonable under the circumstances," the Department noted in the narrative section of the NPRM that

² NPRM at 56,741.

the Department would expect that attorneys perform due diligence on factual submissions in AD/CVD proceedings in the same manner that they would perform due diligence on any other factual submission to which they are certifying as to its completeness and accuracy.³

While the narrative term “due diligence” may connote a level of care that is substantial and in depth, the notion of due diligence found in the accompanying narrative text conflicts with the draft regulatory language which prescribes that the inquiry to be undertaken be one that is “reasonable under the circumstances.” What entails a reasonable inquiry “under the circumstances” may vary widely and may yield inconsistent levels of care. Although it is not necessary to change the wording of the proposed rule, the Department should explain, for example, that a two-minute cursory review of a submission that is to be immediately filed at the Department should not be construed as reasonable under any circumstances.

B. Required Notifications

In both the proposed company and representative certifications, the Department has drafted language requiring that the certifying parties

must notify Import Administration, in writing, if at any point in this segment of the proceeding {the signatory} possess knowledge or have reason to know of a material misrepresentation or omission of fact in this submission or in any previously certified information upon which this submission relies.⁴

Nucor supports this requirement as the language clearly places a duty upon certifying parties to correct any factual errors that exist in the record of the administrative proceeding and to clarify any errors that had previously existed. The proposed language will also assist the Department in obtaining the most complete and accurate record that is feasible. However, while an obligation

³ *Id.* at 56,739.

⁴ *Id.* at 56,740-41.

to notify the Department of any material misrepresentation or omission of fact does bind parties to report the aforementioned errors, the obligation should not create a presumption that parties are free to do so in an apparent effort to extend any statutory or regulatory deadlines.

Specifically, 19 C.F.R. § 351.301 (2004) sets forth certain deadlines for the submission of factual information. In investigations, parties shall submit factual information no later than seven days before the date on which the verification of any person is scheduled to commence;⁵ in regular administrative reviews, the Department has imposed a deadline of 140 days after the last day of the anniversary month.⁶ The regulations further provide that the “Secretary may request any person to submit factual information at any time during a proceeding.”⁷

Notwithstanding these regulatory deadlines, and without further rule clarification from the Department, a certifying party could theoretically inform the Department of a material misrepresentation or omission of fact after the scheduled deadline for the submission of factual information. As justification, a certifying party could argue that the language of the certification requiring the notification to Import Administration of a material misrepresentation or omission of fact would permit the submission of corrections beyond the normal deadlines enumerated by the Department.

Given this fact, Nucor believes that the Department should amend its proposed regulations to include language stating that the submission of a notification of a material misrepresentation or omission of fact shall not circumvent deadlines for the submission of

⁵ 19 C.F.R. § 351.301(b)(1) (2004).

⁶ 19 C.F.R. § 351.301(b)(2) (2004).

⁷ 19 C.F.R. § 351.301(c)(1) (2004).

factual information and will not be considered as supplemental information for purposes of the proceeding if submitted beyond the Department's regulatory and statutory deadlines. If such notification is presented by a party at the commencement of the Department's verification of that party, the notification shall be bound by the verification guidelines pertaining to "minor" corrections.⁸ Regardless of when a notification is submitted by one party, Nucor believes that the Department should afford other interested parties the opportunity to comment on the submission and to provide any rebuttal comments or opposing factual information as is provided for in 19 C.F.R. § 351.301(c)(1).

Nucor submits that the following language be added to the proposed regulations:

Sec. 351.303

* * * * *

(g) (3) "Notwithstanding any duties provided for in this section, the notification by any party to the Department of any material misrepresentation or omission of fact shall not extend the deadlines for the submission of factual information as enumerated in Section 351.301 of these Regulations and shall not be considered for purposes of verification unless, at the commencement of verification, the Secretary or the verifying officials deem the notice to contain minor corrections."

(g) (4) "If a notification of a material misrepresentation or omission of fact is submitted less than 10 days before, on, or after (normally only with the Department's permission) the applicable deadline for submission factual information as described in Section 351.301(b) of these regulations, an interested party may submit factual information to rebut, clarify, or correct the notification no later than 10 days after the date such submission is served on the interested party or, if appropriate, made available under APO to the authorized applicant."

⁸ The Department's regulations do not define what constitutes "minor" corrections, although there is a large quantity of administrative and judicial precedent relating to the Department's acceptance of certain quantities of changes at the commencement of verification.

III. ENFORCEMENT PROCEDURES

In its original January 26, 2004, notice of inquiry which invited parties to submit comments concerning the certification and submission of false statements to import administration, the Department noted in cases where misrepresentation or fraud may have taken place, the Import Administration “may refer and has referred allegations of fraud regarding these certifications to the Department of Commerce's Office of Inspector General or to U.S. Customs and Border Protection for appropriate disposition.”⁹ In response to its solicitation for comments on the issue, many submitters argued that the Department, and the Import Administration in particular, is able to rely upon 18 U.S.C. § 1001 as a basis upon which to engage those company officials or representatives that knowingly mislead or provide false information to the Department. Clearly, the Department concurred with these comments since it has incorporated the reference to 18 U.S.C. § 1001 in both its proposed company and representative certifications. However, while the Department has made it clear that violations of the certification and 18 U.S.C. § 1001 are sanctionable actions, the Department has not made clear the mechanisms in which it can effectively investigate alleged violations of the certification or statute.

Specifically, under the Department’s administrative protective order (“APO”) procedures, there are no clear mechanisms stating the Import Administration’s process for conferring with the Department’s Inspector General – or other enforcement authorities if issues should arise with respect to material submitted under APO guidelines. Clarifying the steps in the process would serve as a deterrent to those who chose to submit misleading or false information.

⁹ Certification and Submission of False Statements to Import Administration During Antidumping and Countervailing Duty Proceedings – Notice of Inquiry, 69 Fed. Reg. 3562, 3563 (Jan. 26, 2004) (“January 26 NOI”).

As such, the Department should consider revising its regulations with respect to administrative protective orders to clarify the procedures for the use of information submitted under the terms of the APO, including any subsequent judicial protective order, in any investigation undertaken by the Department of Commerce's inspector general, the United States Department of Justice, the Internal Revenue Service, or civil litigation on behalf of the United States government.¹⁰ If the Department does not feel that it has the authority under the statute to make these regulatory changes, then the governing statute must be changed.

In addition, the Department should consider the ramifications of a party's withdrawal of APO material from an administrative proceeding or refusal to participate. Under current Departmental regulations, should a party choose to withdraw from an investigation or review prior to the Department's issuance of a final determination, the Department considers the party to have fully terminated its participation in the proceeding and will essentially erase the record of all submissions that relate to the party in question. In this regard, it is possible that a participating party could seek to withdraw from an administrative proceeding after having admitted to the existence of a material misrepresentation or omission of fact and would be free of repercussions or consequences for its violation of the certification's provisions. In light of this situation, the Department should consider formulating guidelines that permit the Department to maintain those records that may be used in any investigation of misconduct by a company official or representative.

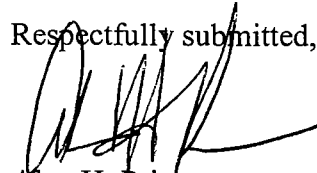
Finally, while the Department has created the framework for identifying potential violations of Import Administration's factual certification provisions, the Department must

¹⁰ See 31 U.S.C. § 3729 (2000).

develop and propose proposals for investigating and potential sanctioning parties who submit false statements and/or violations of the proposed factual information certifications. The Department should consider drafting provisions and regulations that mirror those outlined in the Department's regulations pertaining to the procedures for the investigation and sanctioning of those who violate the terms of an administrative protective order.¹¹ The Department has noted the existence of the aforementioned provisions in its January 26 NOI,¹² and can use these regulations as a framework for additional rulemaking.

Should you have any contacts concerning this submission, please contact the undersigned.

Respectfully submitted,



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¹¹ See 19 C.F.R. Part 354.

¹² January 26 NOI at 3653, n. 1.